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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966

No. 386

JULES JEAN ROUGERON, *Petitioner,*

v.

JEANNE A. ROUGERON, *Respondent.*

On Petition for Writ of Certiorari to the Court of Appeals State of New York

RESPONSE OF PETITIONER TO OPPOSITION OF RESPONDENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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A short response to the Opposition filed by the Respondent is warranted.

1. Respondent first argues that the Petition should be rejected because of an "adequate state ground for decision". There are four immediate answers.

(a) Under New York practice, the right to be heard in the Court of Appeals closely resembles the *certiorari* practice of this Court. Appeals may be taken only upon permission, either of the Appellate Division

or of the Court of Appeals itself. However, one Section of the appeals statute (§ 5601) grants an exception to this "allowance" practice and permits an appeal of right, but only if the case necessitates the decision of federal constitutional questions.

Pursuant to this Section, the appeal was taken in this case from the Appellate Division as of right, (App. p. 10a) raising only federal constitutional questions and no others.

Respondent promptly moved to dismiss the appeal on the ground that there was an adequate state ground for decision, namely, procedural estoppel under state law. This motion was denied unanimously by the Court of Appeals. 14 N.Y. 2d 882.

The Surrogate and the Appellate Division had both refused to consider any of the federal questions and both had disposed of the case on the ground of procedural estoppel. That was the reason for the appeal to the Court of Appeals. Both the four-man majority and the three-man minority in the Court of Appeals decided the case on the federal questions.

Both the majority and the dissenting opinions noted that procedural estoppel had been argued vigorously by the Respondent (App. pp. 5a, 8a, 9a) but, as the majority opinion said:—

> "*But the meaning and application of a treaty is still a question of law which if decided erroneously must be reviewed on appeal,* otherwise the judgment is conclusive." (emphasis supplied) (App. p. 5a)

(b) Further, there could be no procedural estoppel in any event.

The Opposition opens its section on procedural estoppel with the sentence:—

> "There is nothing new or different in this suit (begun by petitioner in the New York Surrogate's Court in 1961) than was in the earlier suit in the same court in which petitioner was a protagonist (beginning in 1955 and ending in a final judgment in 1957)". (Opposition, p. 11)

This statement is not sustained by the record and is negated in the opinion of the Court of Appeals.

The only issue presented in the 1955 proceedings in New York was the question of the propriety of the *probate* of the will (App. pp. 1a, 2a) with respect to assets which were admittedly in New York on date of death (App. p. 9a). The only ground of contest was the domicile of the decedent (App. pp. 2a, 8a) and the Surrogate quite properly dismissed Petitioner's objections to the *probate* because he had no interest in the *New York assets* under New York law. This was unanswerably correct. None of the questions presented in the 1961 proceedings (which are now before this Court) were raised or could have been raised in 1955. None of them existed before 1958.

(c) Further, the Court of Appeals constitutionally was required to refuse to decide the case on the ground of procedural estoppel, since such a decision would have directly opposed the constitutional rule laid down by this Court in *Kalb* v. *Feuerstein* and its successors (Pet. p. 19), a rule which Respondent treats with total silence and no response whatever.

As these cases held, the state court may not refuse to decide the federal questions by invoking a state rule of procedural estoppel, and a decision based on

such an estoppel is not based upon an "adequate state ground".

(d) Finally and most important of all, Respondent treats this case as though there were nothing involved except the single question of the interpretation of the language of the Treaty.

But, even if we concede that Respondent is right and the Treaty is a "domicile" treaty, this means only that *both* the Swiss court and the New York court had concurrent jurisdiction (because Rougeron was domiciled in New York under New York doctrine and was also domiciled in Geneva under Swiss doctrine). Then an additional international question of major importance is raised.

If courts of two different countries have concurrent jurisdiction over the parties and the subject-matter, how shall their respective rights to adjudicate be resolved, so as to avoid two contradictory judgments *in personam* and *in rem*? (Pet. pp. 27-32) The four-man majority of the Court of Appeals ignored this question; the three-man minority held it to be decisive. (App. pp. 8a-9a)

On this point, the Opposition is silent.

Further, to what extent may the jurisdiction and judgment of a court of another country be frustrated by the "self-help" physical removal of property *pendente lite* to the United States? Here again the four-man majority of the Court of Appeals ignored the question; again the three-man minority held it to be decisive. (App. pp. 8a-9a)

There can be no pretense that either of these two latter questions is disposed of by an estoppel created by

the 1955 proceedings, and the Opposition does not so contend. As to them, there is admittedly no "adequate state ground for decision".

2. It is only necessary to lay the three opinions of the appellate court judges in this case side by side. The treaty, constitutional and international law questions instantly appear.

(a) The Court of Appeals of Geneva decided that it had jurisdiction over the subject-matter, and Swiss law applied thereto, because the Treaty is a "situs" treaty and the propery in question had its "situs" in Switzerland under the Swiss law of "situs" on date of Rougeron's death. (A. 168)

(b) The four-man majority in the Court of Appeals of New York disagreed. They held that the New York courts had jurisdiction over the subject-matter, and New York law applied thereto, because the Treaty is *not* a "situs" treaty, but is a "domicile" treaty; and Rougeron was domiciled in New York on date of death under New York doctrines of domicile. (App. p. 7a) However, the majority ignored the effect of the "self-help" removal of the property from Switzerland to New York by the widow *post-mortem;* ignored the Swiss "situs" of the property under the New York law of "situs"; ignored the "double domicile" of Rougeron in both New York and Geneva; ignored the fact that the widow initiated the first probate in Geneva; and ignored the fact that the Respondent had "taken the law into her own hands" to change the devolution of the property, after she had obtained physical possession under the Swiss probate which she had initiated.

(c) The three-man minority in the Court of Appeals of New York disagreed fundamentally with the majority. They held that the "situs" of the property was "of determinative importance". They held that the *post-mortem* transfer of the property to New York from Geneva should not be given effect to oust the then-existing jurisdiction of the Swiss court or to frustrate its judgment, which the Respondent had never obeyed. They held that effect must be given to the prior Swiss probate proceedings. They held that either the New York court was wholly without jurisdiction or was required to direct the return of the property to Geneva for administration in the Geneva court under the judgment of that court. They held that the New York court had no power to dispose of the property contrary to the earlier Swiss judgment.

3. The question before this Court on this Petition for *certiorari* can be simply stated. Shall these important and novel questions of the meaning and interpretation of the Swiss-United States Treaty and of international law be governed by the four-man majority opinion of the New York Court of Appeals (with its vigorous three-man dissent) and shall the four-man majority opinion be the effective precedent in the United States? Or are these questions such that they should be reviewed and decided by this Court?

Respectfully submitted,

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